Supreme Court, U.S.
FILED
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(3)

No. 98-830

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

SOUTHERN UTE INDIAN TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN D. LESHY
Solicitor
Department of the Interior
Washington, D.C. 20240

36 pp

QUESTION PRESENTED

Whether Congress's reservation of "coal" in the Coal Lands Act of 1909, ch. 270, 35 Stat. 844, and the Coal Lands Act of 1910, ch. 318, 36 Stat. 583, includes coal bed methane.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-51a) is reported at 151 F.3d 1251. The panel decision of the court of appeals (Pet. App. 52a-94a) is reported at 119 F.3d 816. The opinion of the district court (Pet. App. 95a-132a) is reported at 874 F. Supp. 1142.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 20, 1998. On October 15, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 18, 1998, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a dispute between the Southern Ute Indian Tribe and petitioners, which include Amoco Production Company and other private entities and individuals, over the ownership of coal bed methane (CBM) that is present within coal seams that underlie the Southern Ute Indian Reservation in Colorado. The Tribe filed suit against petitioners in the United States District Court for the District of Colorado to establish its ownership of that energy resource. The Tribe also sued various federal officials, charging that they had breached their trust responsibilities to protect the Tribe's assets. The district court ruled, on motions for summary judgment, that the Tribe does not own the CBM. Pet. App. 95a-132a. A panel of the United States Court of Appeals for the Tenth Circuit reversed that ruling and remanded the case for further proceedings. *Id.* at 52a-94a. The court of appeals, sitting en banc, reheard the matter and, by a vote of six to three, adhered to the reasoning of the panel decision. *Id.* at 1a-51a. To place this controversy in context, we begin by describing the nature of the physical resource at issue and the statutory bases for the ownership claims. We then turn to the origins and posture of the current controversy.

A. The Physical Resource

The Tribe and petitioners make competing claims to the ownership of CBM that rest, in significant part, on their different characterizations of that energy resource. The Tribe, which indisputably owns the coal underlying its Reservation, contends that CBM is a component of coal. See Southern Ute Br. in Opp. 1, 2-3. Petitioners, who claim a right to drill for natural gas within the reservation, contend that CBM is simply

natural gas that happens to be found in coal deposits. See Pet. 2 & n.1. The scientific literature on coal and CBM provides a useful, but non-dispositive, perspective on those competing characterizations.

1. Coal is essentially fossilized plant material that has undergone a physical and chemical transformation, over millions of years, through the process of accumulation, biological decomposition, and metamorphosis under conditions of high pressure and temperature. See, *e.g.*, C.R. Ward, *Coal Geology*, in 3 *Encyclopedia of Physical Science and Technology* 371 (R.A. Meyers, ed., 2d ed. 1992). Coal is a heterogeneous substance that invariably contains carbonaceous material, moisture, and small amounts of minerals. *Id.* at 372. Because the conditions for coal formation vary, the composition and characteristics of individual coal deposits are not uniform. *Ibid.* For practical purposes, coal users customarily classify coal, based on the ascending degree to which "coalification" has taken place, as lignitic, sub-bituminous, bituminous, and anthracitic. See *id.* at 377, Table I (Coal Classification by the American Society for Testing and Materials). See generally S.L. Bend, *The Origin, Formation and Petrographic Composition of Coal*, 71 J. of Fuel 851, 851-862 (1992) (C.A. App. 664-675).

Bituminous and anthracitic coals generally have the appearance of black rock. Their actual structure, however, is quite complex. See J.W. Larsen & M.L. Gorbaty, *Coal Structure and Reactivity*, in 3 *Encyclopedia of Physical Science and Technology*, *supra*, at 437, 441. At the macroscopic level, coal typically exhibits stratified layers that are themselves composed of microscopic organic composites called macerals (typically vitrinite, liptinite, and inertinite) interspersed with mineral matter. *Id.* at 439-440, 443. The composition of the

macerals depends on the composition of the fossilized organic material (*e.g.*, lignin, waxes, or carbonized wood). *Id.* at 439-440. See generally S.L. Bend, *supra*, 71 J. of Fuel at 862-867 (C.A. App. 675-680).

2. The dispute in this case arises from an unusual physical characteristic of coal: it is extremely porous, containing as much as 20% void volume, and yet is relatively impermeable to passage of gases and liquids. See J.W. Larsen & M.L. Gorbaty, *supra*, at 442-443. The carbonaceous materials within the macerals of bituminous and anthracitic coals typically are "penetrated by an extensive network of very tiny pores and, because of this, have enormous surface areas." *Ibid.* At the same time, the small size of the pores restricts the passage of molecules through the coalbed. "The smaller pores are about the same size as small molecules, so coals are molecular sieves, capable of trapping small molecules in their pores while denying access to larger molecules." *Id.* at 443.[1]

At this molecular level, coal is not a typical crystalline solid. "Coals are believed to be three-dimensionally cross-linked macromolecular networks containing dissolved organic material that can be removed by extraction." J.W. Larsen & M.L. Gorbaty, *supra*, at 444. "The extractable portion of the coal is simply dissolved in this solid, insoluble framework." *Id.* at 445.

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[1] This pore structure differs in several significant respects from that found in "reservoir" rocks that contain hydrocarbon gas and liquids. In the case of coals, the pore structure originated from the same organic material that comprises the contained hydrocarbons, the pore structure is itself composed of hydrocarbons, and the pores are orders of magnitude smaller than those found in reservoir rocks. See J.R. Levine, *Coal Composition, as Related to the Mode of Occurrence of "Coalbed Methane"* 31-32 (Nov. 9, 1992) (C.A. App. 749-750).

"As much as 25% of many coals consists of small molecules that will dissolve in a favorable solvent and can thereby be removed from the insoluble portion." *Id.* at 444. See generally J.R. Levine, *Coal Composition, as Related to the Mode of Occurrence of "Coalbed Methane"* 6-10 (Nov. 9, 1992) (C.A. App. 724-728).

The smallest of the organic molecules present in coal is methane (CH_4). When present in coal beds, it is commonly denominated as coal bed methane (CBM). J.R. Levine, *supra*, C.A. App. 728, 732-733. Like the other organic materials present in coal beds, CBM is a product of the coalification process. *Id.* at 733, 745-748. At standard temperature and pressure, CBM exists as a gas. *Id.* at 733. But when formed in a coal seam, CBM is adsorbed within the pore structure created by the macromolecular matrix. *Ibid.* The CBM, along with other organic molecules, is essentially fixed to the surface of that matrix by inter-molecular electrostatic attractions, known as Van der Waals forces. *Id.* at 728, 740-741.

More so than larger organic molecules within the matrix, CBM can migrate over time, particularly if the coal seam is fractured or if it is subject to changes in temperature and pressure. Those changes alter the equilibrium within the coalbed, counteract the electrostatic forces that fix the CBM in the adsorbed state, and induce the CBM to migrate through the pores and out of the coal's macromolecular structure. See J.R. Levine, *supra*, C.A. App. 733-734, 740-741. Energy companies have developed technology to produce CBM from coal beds through fracturing and creation of pressure or temperature gradients. *Id.* at 733-734. The current controversy centers on whether CBM produced in this manner should be treated, for purposes of the

Coal Lands Act of 1909 and the Coal Lands Act of 1910, as part of the coal or as a separate mineral estate.

B. The Statutory Basis For the Competing Ownership Claims

The competing claims to ownership of CBM arise from two congressional enactments in the early 20th century, the Coal Lands Act of 1909, ch. 270, 35 Stat. 844, and the Coal Lands Act of 1910, ch. 318, 36 Stat. 583. Congress enacted those statutes to allow homesteaders to obtain patents to public lands that the United States believed to be valuable for coal, while reserving the coal itself in federal ownership. The genesis of those statutes is described in *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 47-49 (1983), as well as other sources. See, *e.g.*, R.W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in P.W. Gates, *History of Public Land Law Development* 699, 724-730 (1968).

1. During the latter half of the 19th century, Congress provided unappropriated public lands for settlement through the Homestead Acts, see, *e.g.*, Act of May 20, 1862, ch. 75, 12 Stat. 392, and the Desert Land Acts, see, *e.g.*, Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (43 U.S.C. 321-323), which enabled settlers to obtain a land patent by entering and cultivating tracts of prescribed size for a period of years. See P.W. Gates, *supra*, at 387-434. Congress exempted from entry under those Acts, however, public land classified as valuable for coal. *Western Nuclear*, 462 U.S. at 47-48. Coal lands instead could be purchased under the Coal Lands Act of 1864, ch. 205, 13 Stat. 343, and the Coal Lands Act of 1873, ch. 279, 17 Stat. 607 (see 30 U.S.C. 71 *et seq.*). See generally R.W. Swenson, *supra*, at 724-725.

The process of segregating agricultural lands from coal lands proved unsuccessful because coal lands were frequently misclassified as non-mineral lands as a result of mistake or outright fraud. *Western Nuclear*, 462 U.S. at 48 n.9. In 1906, President Theodore Roosevelt withdrew, from all forms of entry, approximately 64 million acres of lands thought to contain coal, "citing the prevalence of land fraud and the need to dispose of coal 'under conditions which would inure to the benefit of the public as a whole.'" *Id.* at 48-49 (quoting 41 Cong. Rec. 2615 (1907)). President Roosevelt later "urged Congress that 'rights to the surface of the public land . . . be separated from rights to forests upon it and to minerals beneath it, and these should be subject to separate disposal.'" *Id.* at 49 (citation omitted). Congress ultimately responded in part by enacting the Coal Lands Act of 1909 and the Coal Lands Act of 1910. *Id.* at 49 & n.10. See R.W. Swenson, *supra*, at 725-729.

The 1909 Act answered the concerns of individuals who had in good faith made agricultural entries onto tracts subsequently withdrawn as coal lands. The Act permitted an entryman to receive a patent to his tract, but the patent contained a reservation to the United States "of all coal in said lands, and the right to prospect for, mine, and remove the same." 35 Stat. 844 (currently codified at 30 U.S.C. 81). The 1910 Act opened the remaining coal lands for entry under the homestead laws, allowing "actual settlers," upon proof of compliance with the homestead laws, to receive patents to those lands. As in the case of the 1909 Act, the patents contained a reservation to the United States "of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same." 36 Stat. 584 (currently codified at 30 U.S.C. 83-85).

2. The lands opened for settlement under the 1909 and 1910 Acts included lands within the Southern Ute Indian Reservation in Colorado. In 1880, the members of the Southern Ute Indian Tribe agreed to sell a large portion of their land within the Reservation to the United States, excepting certain allotted lands "provided for their settlement." Act of June 15, 1880, ch. 223, 21 Stat. 200. Congress directed that the ceded, unallotted reservation lands be treated as public lands, and it opened those lands to entry for non-Indian settlement under the homestead laws. See 21 Stat. 203-204. See generally *United States* v. *Southern Ute Tribe*, 402 U.S. 159, 162-164 (1971). The ceded territory included lands that President Roosevelt later withdrew from entry and that Congress made available for patenting under the 1909 and 1910 Acts.

In 1938, under the authority of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*), the United States restored to the Tribe, in trust, title in the ceded reservation lands (including reserved coal) that had not been disposed of to settlers. Pet. App. 109a. As a result of that restoration, the Southern Ute Indian now has equitable title to tribal lands within its Reservation and the coal estate beneath lands within the Reservation that were settled by non-Indians under the 1909 and 1910 Acts. Petitioners, by contrast, either own the non-coal portions of the lands conveyed under the 1909 and 1910 Acts or hold mineral leases from those owners limited to the non-coal portions of those lands. *Id.* at 109a-110a. See La Plata County Amicus Br. 16a (map of Southern Ute Indian Reservation).

C. The Current Controversy

The energy shortages of the 1970s prompted investigation into alternative fuel sources, including the possibility of producing CBM from coalbeds. Questions arose, however, over who owned the CBM if the owner of the fee had severed, by sale or reservation, a coal estate or a gas estate from the remainder of the fee. Those issues could arise under federal law with respect to lands patented under the 1909 and 1910 Acts, which reserved all "coal" to the United States, as well as lands patented under the Agricultural Entry Act of 1914, 30 U.S.C. 121 *et seq.*, which reserved "gas" to the United States. Similar questions of federal law could also arise under the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, which establishes separate procedures for leasing coal and for leasing oil and gas. See 30 U.S.C. 221, 226. CBM ownership issues could also arise on other lands governed by state law, by virtue of an individual owner's decision to lease or reserve coal or gas. See, *e.g.*, S.K. Farnell, *Methane Gas Ownership: A Proposed Solution for Alabama*, 33 Ala. L. Rev. 521 (1982).[2]

1. In 1981, the Solicitor of the Interior issued an opinion entitled "Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits," M-36935, 88 Interior Dec. 538 (May 12, 1981) (Pet. App. 140a-159a). The Solicitor concluded: (1) the 1909 and 1910 Acts did not reserve the coal bed gas found in the reserved coal; (2) the reservation of gas under the Agricultural Entry

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[2] See also, *e.g.*, E.A. Craig and M.S. Myers, *Ownership of Methane Gas in Coalbeds*, 24 Rocky Mt. Min. L. Inst. 767 (1978); P.C. McGinley, *Legal Problems Relating to Ownership of Gas Found in Coal Deposits*, 80 W. Va. L. Rev. 369 (1978); R.K. Olson, *Coalbed Methane: Legal Considerations Affecting Its Development As An Energy Resource*, 13 Tulsa L.J. 377 (1978).

Act did include coal bed gas; and (3) coal bed gas is disposable under the oil and gas leasing provisions of the Mineral Leasing Act. See Pet. App. 143a. The Solicitor cautioned, however, that "nothing in this opinion warrants title to any oil and gas deposit." *Id.* at 159a.

2. Ten years later, on December 31, 1991, the Tribe filed this action against petitioners and others who asserted a right to CBM derived from the Tribe's coal. The Tribe sought a declaration that it is the sole owner of the CBM, and it sought damages for the alleged trespass and conversion of the Tribe's property. The Tribe also sued the United States, seeking a declaration that the United States owed a duty to the Tribe to protect and manage CBM development for the Tribe on lands covered by the 1909 and 1910 Acts.[3]

Petitioners responded that the reservation of "all coal" in the 1909 and 1910 Acts did not include CBM, and they also raised other affirmative defenses. The United States concurred in petitioners' interpretation of the two Acts, relying on the 1981 Solicitor's opinion, and additionally asserted that the Tribe's breach of trust claim against the United States was barred by the applicable six-year statute of limitations, 28 U.S.C. 2401(a), in light of the Tribe's past history of CBM development and its knowledge of the Solicitor's 1981 opinion.

3. The district court ruled on cross-motions for summary judgment that "Congress did not reserve CBM gas in the United States in the Coal Lands Acts of

[3] The Tribe also filed suit against the United States in what is now the United States Court of Federal Claims, alleging that the United States had breached its trust obligation to protect the Tribe's interest in property with respect to development of the CBM. See U.S. C.A. Br. 26 n.7.

1909 and 1910 and, consequently, [the Tribe's] claim of equitable ownership to CBM gas in the lands at issue fails." Pet. App. 98a. The court concluded, on the basis of dictionary definitions that describe coal as a "solid" or "rock," that the 1909 and 1910 Acts do not include CBM. *Id.* at 110a-116a. The court also concluded that the legislative history of those Acts, which made no reference to CBM, supported that interpretation. *Id.* at 116a-127a. The court additionally stated that the 1981 Solicitor's opinion was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 128a-130a. At the same time, the district court rejected the Tribe's invocation of the principle that doubts regarding the interpretation of statutes be resolved in favor of the Indians. The court found that principle inapplicable because the 1909 and 1910 Acts are public land laws, not laws passed for the benefit of Indians. *Id.* at 127a. Finally, the district court declined to address affirmative defenses, including the United States' assertion that the action was barred by the applicable statute of limitations. See *id.* at 130a-131a.

4. The court of appeals reversed the district court's judgment and remanded for further proceedings. Pet. App. 52a-94a. The court of appeals reasoned that the question of CBM ownership "cannot be disposed of by the simple tautology that gas is gas," *id.* at 63a-64a, because Congress could have reasonably viewed adsorbed CBM as "an integral part of the coal," *id.* at 64a. The court concluded that the 1909 and 1910 Acts did not manifest a specific intent to convey CBM, *id.* at 66a, and, by contrast, that those Acts did manifest a general intent to reserve the federal government's entire economic interest in the coal deposits, *id.* at 71a-72a. Those considerations, "coupled with the principle of

statutory construction that resolves ambiguity in favor of the sovereign," see, *e.g.*, *Western Nuclear*, 462 U.S. at 59, persuaded the court that "CBM was reserved to the United States." Pet. App. 72a. The court of appeals also rejected the district court's conclusion that the 1981 Solicitor's opinion was entitled to *Chevron* deference, reasoning that "*Chevron* deference is owed only to legislative rules and agency adjudications." *Id.* at 85a. The court of appeals remanded the case for further proceedings to resolve, among other questions, whether the Tribe's challenge is barred by the statute of limitations. *Id.* at 94a & n.27.

5. Petitioners sought rehearing en banc, and the en banc court granted rehearing limited to the question "whether the term 'coal' as used in the 1909 and 1910 coal lands statutes unambiguously excludes or includes coalbed gas." By a vote of six to three, the en banc court adhered to, and supplemented, the reasoning of the unanimous panel. Pet. App. 1a-51a; see *id.* at 8a-9a. The en banc court specifically held that the term "'coal' as used in the Coal Lands Acts of 1909 and 1910 neither unambiguously includes nor excludes coal bed methane. Given the established principle that all doubts respecting land grants and mineral reservations are construed in favor of the government, *see Watt v. Western Nuclear, Inc.*, 462 U.S. at 59, * * * coal reserved to the United States in the 1909 and 1910 Acts includes the adsorbed CBM." *Id.* at 32a-33a.

In reaching the conclusion that the 1909 and 1910 Acts are ambiguous, the en banc court surveyed the text of those Acts, Pet. App. 11a-14a, contextual indicia of Congress's specific intent, *id.* at 14a-24a, and indicia of Congress's general intent drawn from the legislative history and related statutes, *id.* at 24a-32a. The en banc court expressly declined to reconsider the panel's

decision that the 1981 Solicitor's opinion was not entitled to *Chevron* deference. *Id.* at 9a-10a. It also noted that "[o]ur reversal will require the district court to address the defenses asserted by defendants to preclude recovery by the Tribe, at least some of which appear to raise issues of serious magnitude." *Id.* at 33a n.19. Three judges dissented, reasoning that "coal was not understood, either in 1909 or today, to include a gas." *Id.* at 34a; see *id.* at 34a-51a.[4]

ARGUMENT

The United States submits that the petition for a writ of certiorari should be denied. First, the decision below satisfies none of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction—the issue is novel, there is no conflict among the courts of appeals regarding the interpretation of the relevant federal statutes, and the case is in an interlocutory posture. Moreover, Congress has taken action in response to the court of appeals' decision, and it now appears that the decision will directly and immediately affect only the parties to this particular litigation. Congress is in a better position than this Court to address any indirect effects over the long term. Finally, the court of appeals' decisions in this

[4] The United States did not petition for rehearing en banc. It filed a supplemental brief explaining that it had previously endorsed petitioners' arguments on the basis of the 1981 Solicitor's opinion and not merely on the basis that the question of CBM ownership should be resolved by reference to the dictionary meaning of the term "coal." See Pet. App. 9a n.2. The United States additionally explained that, in light of the panel's decision, the Solicitor of the Interior had commenced a review of the analysis set out in the 1981 Solicitor's opinion and that the review could conceivably result in modification of the views expressed therein. *Ibid.*

case have prompted the Solicitor of the Interior to reconsider the analysis set forth in the 1981 Solicitor's opinion, and he has withdrawn that opinion. See Add. 1a. Accordingly, this case no longer involves the issue of *Chevron* deference that petitioners raise in the question presented.

A. This Case Does Not Satisfy The Court's Criteria For Certiorari

Petitioners contend that certiorari is warranted here because "the court of appeals fundamentally misinterpreted major public lands statutes" (Pet. 16-21), because its decision manifests "a deep split in the circuits" respecting *Chevron* deference (Pet. 21-23), and because the issue presents an "important national question" that "must be resolved now" (Pet. 23-28). The United States, which has elected not to seek certiorari in this case, does not share petitioners' view. To the contrary, this case lacks the normal prerequisites for obtaining certiorari on a question of statutory construction. We first discuss those threshold considerations and then turn to petitioners' specific arguments in support of certiorari.

1. This Court does not normally grant certiorari in cases involving questions of statutory construction in the absence of a square conflict among the courts of appeals on the meaning of the federal statute involved. See Sup. Ct. R. 10. No such conflict exists here. The court of appeals' decision in this case addresses a novel issue of statutory interpretation under two public land laws that are nearly a century old. No other federal court—much less another federal court of appeals—has addressed the question of whether the Coal Land Acts of 1909 and 1910 reserved CBM in federal ownership. Furthermore, we are not aware of any pending litigation raising that issue. Thus, there is no need for this Court to grant certiorari to secure uniformity among the decisions of the courts of appeals. See R.L. Stern et al., *Supreme Court Practice* 168 (7th ed. 1993). Indeed, the grant of certiorari on a novel issue in the absence of a conflict would deprive the Court of the benefit of a fully ventilated discussion of the issue among the courts of appeals.[5]

The decision below is not only one of first impression that has generated no conflict among the circuits, but it is also interlocutory. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967)(per curiam)

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[5] To be sure, in appropriate circumstances, the United States has asked this Court to address important public land issues in the absence of a circuit conflict. See *Western Nuclear*, 462 U.S. at 42 & n.4; but see *id.* at 72-73 (Stevens, J., dissenting) (suggesting that certiorari should have been denied); *Watt* v. *Alaska*, 451 U.S. 259, 274 & n.2 (1981) (Stevens, J., concurring) (same). The United States, however, is circumspect in seeking review in the absence of a circuit conflict, particularly in light of the fact that this Court recently denied a government petition presenting a public land issue that the United States deems important and that *had* generated a circuit conflict. See *United States* v. *Koch*, 516 U.S. 915 (1995) (denial of certiorari involving public lands issue affecting ownership of 11,000 unsurveyed islands). In this case, the United States was entitled to file a petition for certiorari seeking review of the judgment of the court of appeals, but has decided not to do so for the reasons articulated in this brief.

(denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"); see also R.L. Stern et al., *supra*, at 197 (in the absence of an "unusual factor, the interlocutory nature of a lower court judgment will result in a denial of certiorari").

In this instance, the case is not interlocutory in a merely technical sense. To the contrary, in remanding the case, the en banc court of appeals stated that "[o]ur reversal will require the district court to address the defenses asserted by defendants to preclude recovery by the Tribe, at least some of which appear to raise issues of serious magnitude." Pet. App. 33a n.19. If it is determined that those defenses preclude the Tribe from obtaining relief, that determination will effectively moot the dispute between the Tribe and the other parties over ownership of CBM and preclude the need for this Court's review.[6]

2. Given the absence of a conflict among the circuits, the interlocutory nature of the court of appeals' decision, and the absence of other pending litigation, petitioners face a heavy burden in establishing the need for

[6] For example, the United States has raised a statute of limitations defense in response to the Tribe's breach of trust claims. See Pet. App. 131a; see also 28 U.S.C. 2401(a) (establishing a six-year limitation period). As the United States explained at length in its court of appeals brief, the record developed below reveals that the Tribe did not file its suit until more than six years after the Tribe and its lawyers knew of and acknowledged receipt of the 1981 Solicitor's opinion, knew that CBM was being extracted on non-tribal fee lands pursuant to private oil and gas leases, and knew that the Department of the Interior had approved communitization agreements pooling tribal and fee lands. See U.S. C.A. Br. 14-26, 30-43.

this Court's review. The three proffered bases fall short of the mark.

a. Petitioners first argue that certiorari is warranted because the court of appeals "fundamentally misinterpreted major public lands statutes." Pet. 16-21. Petitioners' assertions that the court below misconstrued the statutes at issue—which are no more "major" than many other public land laws—does not provide an adequate basis for this Court's review. "Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals." *Alaska*, 451 U.S. at 275 (Stevens, J., concurring). To the extent that the correctness of the decision below bears on whether this Court should grant review, the question that the court of appeals addressed is far closer—and its answer more formidable—than petitioners portray.

Petitioners argue that the reservation of coal could not include CBM because dictionaries describe coal as a "solid" and "[c]ommon sense dictates" that coal cannot include CBM (Pet. 16 & n.6). The dictionary definitions, however, are not particularly enlightening because they primarily describe the appearance—rather than the composition—of "coal." See Pet. 16 n.6; compare *Western Nuclear*, 462 U.S. at 42-43 (dictionary definitions of "mineral" unhelpful). And petitioners' invocation of "common sense" simply begs the question. The en banc court of appeals is not alone in rejecting those arguments as unconvincing. Three of the four state-court decisions that have addressed CBM ownership have held, as a matter of state law, that a grant or reservation of "coal" can include CBM.[7]

[7] See *NCNB Texas Nat'l Bank, N.A.* v. *West*, 631 So. 2d 212 (Ala. 1993) (adsorbed CBM is part of coal estate); *Vines* v.

As we pointed out in our supplemental brief on rehearing en banc, the question of CBM ownership should not be resolved by facile references to dictionary definitions of the term "coal." Pet. App. 9a n.2. The court of appeals in this case looked beyond dictionary definitions and analyzed the whole statutory language (*id.* at 11a-14a), its context (*id.* at 14a-24a), the legislative history (*id.* at 24a-30a), and related statutes (*id.* at 30a-31a). The court ultimately concluded that the 1909 and 1910 Acts are ambiguous on the precise matter at issue here (*id.* at 32a). The court of appeals' mode of analysis was the same as that employed by both the majority and the dissent in *Western Nuclear*. See 462 U.S. at 42-60; *id.* at 60-72 (Powell, J., dissenting).

There is accordingly no merit to petitioners' hyperbole that the court "breach[ed] the most fundamental tenets of statutory construction" (Pet. 17) or engaged in "result-oriented" analysis (Pet. 18 n.7). To the contrary, the court of appeals' decisions raised serious questions that have prompted the Solicitor of the Interior to reevaluate the 1981 Solicitor's opinion--a matter that we discuss at pages 25-28, *infra*. The important point for present purposes is that the court of appeals' decision exhibits no "fundamental" flaws that would warrant this Court to take the extraordinary step of granting certiorari to review an interlocutory decision addressing a novel statutory issue that does not give rise to any circuit conflict.

McKenzie Methane Corp., 619 So. 2d 1305 (Ala. 1993) (grant of "all coal" included coalbed methane); *United States Steel Corp.* v. *Hoge*, 468 A.2d 1380 (Pa. 1983) (right to "drill through coal" for gas did not include right to recover adsorbed CBM). But see *Carbon County* v. *Union Reserve Coal Co.*, 271 Mont. 459 (1995) (grant of "all coal and coal rights" did not include CBM).

b. Petitioners' contention that this Court should grant review to "resolve a deep split" among the courts of appeals respecting application of the *Chevron* doctrine (Pet. 21-23) is also without merit. This Court has refined the *Chevron* doctrine in the course of resolving statutory issues that independently warrant this Court's review. The Court does not typically grant certiorari, in a case that does not otherwise justify review, simply to review a court's application of *Chevron* principles. Compare, *e.g.*, *Atlantic Mut. Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1417, 1418 (1998); *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1732 (1996); *Reno* v. *Koray*, 515 U.S. 50, 54, 60-61 (1995).

In any event, this case would not provide an appropriate instance for reviewing the question whether *Chevron* deference is owed to agency interpretations that are not embodied in legislative rules or adjudications. As a general matter, we agree with petitioners that an agency is entitled to *Chevron* deference whenever the agency, in the course of exercising authority assigned to it by Congress, adopts a reasonable interpretation of an ambiguous statute. Pet. 22. See *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 647-652 (1990); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-157 (1991). In this case, however, the Court would first need to resolve the serious antecedent question of whether Congress has assigned authority to the Department of the Interior to make post-conveyance determinations that are entitled to deference in disputes with other parties regarding the scope of the statutory reservations set out in the 1909 and 1910 Acts. See Pet. App. 82a-84a & n.22.

The *Chevron* doctrine comes into play only if Congress "left ambiguity in a statute *meant for implementation by an agency*." *Smiley*, 116 S. Ct. at 1733 (em-

phasis added). See *Metropolitan Stevedore Co.* v. *Rambo*, 117 S. Ct. 1953, 1963 n.9 (1997). That matter did not receive adequate attention below. The court of appeals did not resolve it, Pet. App. 82a, and this Court would need to decide that issue before it could reach the *Chevron* issue that petitioners contend warrants this Court's review. Moreover, the Solicitor's decision to withdraw the 1981 Solicitor's opinion (see pp. 25-28, *infra*) has now mooted the question of whether that opinion is entitled to *Chevron* deference. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992). Given those circumstances and the fact that *Chevron* questions regularly recur, the Court should await a more appropriate case in which to address the *Chevron* issue petitioners pose.[8]

c. Petitioners and their amici also contend that this case involves an "important national question" that "must be resolved now to avoid industry disruption and profound uncertainty and hardship." Pet. 23-28. The United States disagrees with that assessment and with the notion that the Court's review of the specific issue in this particular case (which would not resolve questions of CBM ownership under state law) could provide the "national" or industry-wide certainty they contend is needed.

As noted above, this case is one of first impression, and we are not aware of any other pending litigation on the question of whether the 1909 and 1910 Acts reserve

[8] The district court correctly rejected the Tribe's argument that any ambiguity in the 1909 and 1910 Acts should be resolved in favor of the Indians in this case. As the district court pointed out (Pet. App. 127a), the Acts are public land laws, not statutes passed for the special benefit of Indians. That fact that the coal reserved by the United States in this case was conveyed to an Indian Tribe therefo e has no bearing on the applicable legal analysis.

CBM as part of the coal estate. Because the Tenth Circuit is the first court of appeals to address the question, its ruling has actually diminished long-standing uncertainty respecting ownership of CBM. Before petitioners began their commercial CBM ventures, legal commentators had repeatedly expressed the widely recognized understanding that CBM development posed novel legal issues respecting ownership of the resource. See note 2, *supra*. And prior to the court of appeals' ruling in this case, two of the three state supreme courts that had addressed CBM ownership had ruled that the owner of the coal estate owned CBM under state law. See note 7, *supra*. The court of appeals has decided the issue in accord with the current majority rule in the state courts. That decision has clarified the law; it simply has not clarified the law in the way that petitioners would have preferred.

Petitioners' claims (Pet. 23) of "industry disruption and profound uncertainty and hardship" are exaggerated. The current level of CBM development is quite small and is concentrated primarily in the Tenth Circuit. See Southern Ute Br. in Opp. 16-17. Although petitioners contend that this case affects more than 16 million acres of potential coal land (Pet. 24 & n.13), only a small fraction of that land is likely to contain economically recoverable CBM, and only a small fraction of the current landowners would be affected. Indeed, petitioners concede that, in 1994, even after Congress had provided temporary tax incentives for CBM production, see 26 U.S.C. 29, there were only 6300 producing CBM wells in the entire Nation. Pet. 25.[9]

[9] By comparison, in 1992, more than 280,000 natural gas wells were in production nationwide. See National Petroleum Council, U.S. Dep't of Energy, *Marginal Wells* 39 (1994). The distribution

Furthermore, this case appears to present a unique situation under the 1909 and 1910 Acts. The Department of the Interior has informed us that its research has failed to identify any non-federal entity, other than the Southern Ute Indian Tribe, that has succeeded to the United States' reservation of coal under those Acts. Because the coal reserved by the 1909 and 1910 Acts remains almost exclusively in federal hands, Congress, which can take prospective action and grant retrospective relief, remains best situated to address any questions of "national importance" respecting ownership of CBM. Cf. *Kiowa Tribe* v. *Manufacturing Tech., Inc.*, 118 S. Ct. 1700, 1705 (1998) ("The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution.").

Indeed, Congress has addressed such issues in the past and has demonstrated its capacity to tailor a legislative response that is appropriate to the circumstances presented. For example, in 1955, Congress took action to settle disputes over the removal of "source material" from coal lands. See Uraniferous Lignite Act, 30 U.S.C.

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of the CBM wells is also significant. The largest number of CBM wells (2,706) were located in Alabama, where the Alabama Supreme Court has ruled that the coal estate owner also owns the CBM (see note 7, *supra*). See S.H. Stevens et al., *Technology Spurs Growth of U.S. Coalbed Methane*, 94 Oil & Gas J. 56 (Jan. 1, 1996) (1996 WL 8286296, at Table 4). See also *id.* at *4 ("Development in the Warrior basin slowed markedly following the end of the tax credits, with just 79 new CBM wells added during 1994."). Most of the remaining wells (2,514) were located in the San Juan Basin (including the lands involved here) and would be governed by the Tenth Circuit's analogous rule. See *id.* at Table 4. See also *id.* at *3 ("The San Juan basin dominates the industry, accounting for 82% of total CBM production in 1994 * * *, but new well completions dropped to one third of 1992 levels as the basin matured with just over 2,500 producing wells.").

541-541i. More recently, Congress has taken steps to clarify ownership issues respecting CBM. It created a framework, under the Energy Policy Act of 1992, Pub. L. No. 102-486, § 1339, 106 Stat. 2986, to assist States in resolving CBM ownership issues. See 42 U.S.C. 13368. And, in direct response to this litigation, Congress enacted the Enzi Act, Pub. L. No. 105-367, 112 Stat. 3313, to address CBM ownership issues under the 1909 and 1910 Acts. See Southern Ute Br. in Opp. 6a-8a.

Congress enacted the Enzi Act to ameliorate hardships that could result as a consequence of the court of appeals' decision. That Act disclaims any infringement on the United States' ownership rights to CBM in those situations in which a patentholder under the 1909 Act or the 1910 Act had leased CBM or applied for a permit to drill a gas well to a completion target located in a coal formation. See § 1(a)(1) and (2), 112 Stat. 3313-3314. Hence, patentholders, other than the parties to this litigation, who have commenced CBM leasing and drilling activities on those lands will not be affected by the court of appeals' decision.[10] In the face of congressional action, this Court need not rush to act in response to their concerns. Compare *Alaska*, 451 U.S. at 265 n.8 (because of congressional inaction, "we are left to resolve by judicial construction what should be

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[10] The Enzi Act exempts from its coverage "any interest in coal or land conveyed, restored, or transferred by the United States to a federally recognized Indian tribe." § 1(b)(4), 112 Stat. 3314. As we have noted in the text (see p. 22, *supra*), however, the Interior Department has not identified any other Indian Tribe (or any other non-federal entity) to which coal reserved under the 1909 or 1910 Act was transferred.

addressed as a question of legislative policy judgment").[11]

At bottom, the court of appeals' decision will have a direct and immediate effect only on the parties to this litigation. In considering petitioners' claims of "significant financial hardship" (Pet. 27), the Court should bear two factors in mind. First, at the time petitioners commenced development of CBM, there was considerable, well-publicized uncertainty respecting title to CBM, see note 2, *supra*. The 1981 Solicitor's opinion articulated the Interior Department's judgment on the matter, but it also expressly made clear that "nothing in this opinion warrants title to any oil and gas deposit." Pet. App. 159a; see also *id.* at 80a n.20. In the face of the outstanding uncertainty, petitioners elected to go forward with CBM production from potentially disputed lands without taking steps to resolve the title issues and (insofar as appears) without taking steps to insure against the known risks of an adverse title judgment. Compare J.L. Lewin, *Coalbed Methane: Recent Court Decisions Leave Ownership "Up in the Air," But New Federal and State Legislation Should Facilitate Production*, 96 W. Va. L. Rev. 631, 648 (1994) ("CBM development usually requires a negotiated compromise among gas owners and coal owners, and a 50-50 split is not an uncommon arrangement."). Second, this case remains in an interlocutory posture, and until the district court resolves the outstanding defenses, the question of liability remains open. Petitioners' contentions of "hardship" do not provide a basis for departure from the Court's normal practice of declining review of interlocutory decisions, particularly where the proceedings on remand may eliminate the dispute and the alleged hardship.

[11] Petitioners and their amici contend that the Enzi Act provides only "limited relief" because it does not, for example, protect CBM lessees from claims by coal lessees (Pet. 25 n.15), and it does not guarantee patentholders who have not undertaken CBM development that they will receive title to CBM (Pet. 26-27). Congress is entitled, however, to make a judgment that the relief granted is sufficient to meet the current needs of the patentholders and to revisit unresolved issues at a later date. See 144 Cong. Rec. S10,595 (daily ed. Sept. 18, 1998) (statement of Senator Enzi that Congress could "pursue a more in-depth review" in the future in order to "work out problems with future leases and with conflicting resource use issues"). Moreover, a decision of this Court, which could decide only the disputed issues in this case, would not necessarily resolve those issues or other speculative questions respecting CBM ownership.

B. The Solicitor Of The Interior Has Withdrawn the 1981 Solicitor's Opinion

The 1981 Solicitor's opinion expressed the Interior Department's judgment respecting ownership of CBM under the 1909 and 1910 Acts. The legal conclusion expressed therein was reasonable at the time it was rendered. Nevertheless, as this Court has made clear, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863. To fulfill its executive responsibility, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-864. That principle applies to legal interpretations. An agency must be willing to reassess its past opinions in light of new judicial decisions and the insights gained in the course of litigation. See, *e.g.*, *Nicklos Drilling Co.*, 505 U.S. at 476. Here, the Solicitor of the Interior has reassessed the 1981 Solicitor's opinion in light of the court of appeals' panel and en banc decisions. On the basis of that reassessment, he has concluded that the analysis contained therein now appears inadequate in certain

key respects in the light of those decisions. The Solicitor has therefore concluded that the opinion should be withdrawn. See Add. 1a.

1. The 1981 Solicitor's opinion evaluated the 1909 and 1910 Acts on the basis of a relatively simple analysis that, in retrospect, did not fully appreciate the complexities of the issue. The opinion first drew a sharp dichotomy, based on contemporary dictionaries and publications, between CBM—which it characterized as a "gas"—and coal—which it characterized as a "solid, brittle, more or less distinctly stratified, combustible carbonaceous rock." Pet. App. 143a-144a & n.9. It then described the enactment of the 1909 and 1910 Acts, noting the "well-established principle that nothing passes in a public land grant by implication" but also observing that public land grants "are not to be so construed as to defeat the intent of the legislature." *Id.* at 145a (quotation marks and citation omitted).

The 1981 Solicitor's opinion next stated that the Acts did not enunciate an "affirmative Congressional policy" respecting "the disposition or ownership of coalbed gas," but concluded that "it is apparent from the legislative history" that "Congress was aware of the narrow scope of the proposed reservation of 'coal.'" Pet. App. 146a. It relied on two floor statements of a single congressman that the Acts reserved "only the coal, and not other minerals." *Id.* at 146a-147a. The opinion also identified two subsequently enacted statutes—the Uraniferous Lignite Act and 30 U.S.C. 124—and inferred, from passages in the legislative reports supporting their enactment, a congressional understanding that a federal reservation of one mineral did not reserve other minerals that occurred in close association. Pet. App. 147a-149a. The opinion also noted that a Pennsylvania

trial court had concluded "that coalbed gas was not conveyed in a grant of 'coal.'" *Id.* at 150a.

2. Viewed in light of current perspectives on statutory construction and the court of appeals' opinions below, the 1981 Solicitor's opinion no longer provides an adequate analysis of the issue presented here. As this Court recently stated, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). The 1981 Solicitor's opinion—unlike the court of appeals' en banc decision (see Pet. App. 11a-14a, 14a-24a, 24a-32a)—did not analyze the issue in that way.

The 1981 opinion's textual analysis was limited to a single word—"coal." The opinion relied on a contemporary dictionary—which primarily described the appearance, rather than the composition, of the substance—to conclude that "coal" and CBM are necessarily distinct substances. The opinion did not take into account existing knowledge about the origins, structure, and composition of coal (see pp. 3-5, *supra*) or, more importantly, what Congress in 1909 and 1910 would have understood about those matters. See Pet. App. 14a-18a. In addition, the 1981 opinion did not analyze the text in light of the overarching purposes of the 1909 and 1910 Acts. See *Western Nuclear*, 462 U.S. at 46-56. Compare Pet. App. 18a-21a.[12]

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[12] For example, the 1981 opinion did not consider that, at the time of the reservation, the agricultural patentee had no use for (or means of extracting) CBM, while the United States could not remove the reserved coal without also removing the adsorbed CBM. It seems unlikely that Congress intended to give the agricultural patentee a useless commodity that would necessarily

The 1981 opinion's heavy reliance on legislative history, in place of textual analysis, was also problematic. As the court of appeals noted, "legislative history should be treated cautiously." Pet. App. 28a (citation omitted). In this case, the cited legislative history is relatively sparse, indirect, and inconclusive on the core question of whether the reservation of coal includes adsorbed CBM. See *id.* at 28a-29a, 31a & n.18. The 1981 opinion's reliance on the opinion of the Pennsylvania trial court decision now also presents problems, because the Pennsylvania Supreme Court reversed that ruling, *United States Steel Corp.* v. *Hoge*, 468 A.2d 1380 (1983), and other state courts have concluded that the owner of the coal estate also owns the CBM. See Pet. App. 21a-24a; note 7, *supra*.

3. For the foregoing reasons, the Solicitor of the Interior has determined that the court of appeals' en banc decision presents a more thorough and persuasive analysis of the issue presented here than the 1981 Solicitor's opinion, and he has therefore withdrawn the 1981 Solicitor's opinion. The United States accordingly will no longer rely upon it in this case or in any future litigation. The Department of the Interior will continue to work with Congress to evaluate whether additional legislation is appropriate to address any future questions respecting CBM ownership.

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be dissipated when the coal owner removed the coal. It might be possible to infer that Congress expected that the courts would clear up the matter by devising federal common-law rules that would excuse a taking of the patentee's CBM, or require the payment of compensation for its waste. But the simpler inference here may be the better one – *viz.*, Congress reserved CBM as an integral part of the coal estate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JOHN D. LESHY
Solicitor
Department of the Interior
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys

JANUARY 1999

ADDENDUM

[Seal Omitted]

UNITED STATES DEPARTMENT OF INTERIOR

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 4, 1999

To: Secretary

From: Solicitor

Re: Withdrawal of Previous Solicitor's Opinion Addressing Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits

The May 12, 1981 Opinion of the Solicitor on this subject (#M-36935) is hereby withdrawn.